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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eklund Infrared

File: B-238021

Date: March 23, 1990

Paul F. Khoury, Esq. and Rand L. Allen, Esq., Wiley, Rein & Fielding, for the protester.

Thomas G. Jacques, for the interested party, Inframetrics, Inc.

Colonel Herman A. Peguese, Department of the Air Force, for the agency.

Stephen J. Gary, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where General Accounting Office sustains protest against award on basis that agency concedes it made award to nonconforming offeror, but contract has been performed so that recompetition of the requirement no longer is a practicable remedy, protester is entitled to reimbursement of protest and proposal preparation costs.

2. Protest was not untimely filed--such that General Accounting Office would not have sustained protest against award agency concedes was improper--where agency asserts, without documentation, that it advised protester of denial of agency-level protest more than 10 working days before protest was filed, but protester denies receiving such advice and circumstances tend to support protester's position; doubt as to timeliness is resolved in favor of the protester.

3. Protester, the third low acceptable offeror, did not fail to qualify as an interested party eligible to bring protest--such that General Accounting Office would not have sustained protest against award agency concedes was improper--where protest alleged award improperly was based on relaxed requirements; appropriate remedy for successful protest on this ground could be recompetition, which would afford protester opportunity to offer different price on changed requirements.

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DECISION

Eklund Infrared protests the award of a contract to Inframetrics, Inc., under request for proposals (RFP) No. F04700-89-R-A101, issued by the Air Force for a thermal imaging system. The RFP was for a brand name (Eklund Infrared Model 88LWB) or equal item, and listed the minimum salient characteristics required of the product. Eklund asserts that Inframetrics' product failed to comply with the RFP's salient characteristics.

We sustain the protest.

The solicitation stated that award would be made to the lowest priced technically acceptable offeror, and that award could be made on the basis of initial proposals. Of the four proposals received, the agency found the lowest priced to be technically unacceptable. Of the three remaining, the proposed prices were as follows:

Inframetrics, Inc. (Model 600)	\$62,200
UTI Instruments	\$62,750
Eklund Infrared	\$81,463

The Air Force awarded the contract to Inframetrics on September 29, 1989, and Eklund filed an agency-level protest of the award on October 6, alleging that Inframetrics failed to meet the specifications for a product equal to its own. On October 20, the contracting officer received a telephone inquiry from Eklund on the status of its protest. According to the contracting officer, in the course of a 90-minute conversation she informed Eklund that its protest was "denied totally" and that a written letter of denial would be forthcoming. The agency's written denial of the protest was dated November 17, and was received and date-stamped, Eklund alleges, on November 28. On December 11, Eklund filed its protest with our Office.

In a letter to our Office dated January 19, 1990, the Air Force concedes the merits of the protest. According to the agency, it has concluded that the "equal" product on which the award was based failed to meet performance features identified as salient characteristics of the listed brand name. We find nothing in the record that would indicate the agency is incorrect. The agency asserts, however, that, although it agrees that the award to Inframetrics was improper, the protester is not entitled to any relief. Specifically, resolicitation or award to Eklund would be impracticable since Inframetrics has completed performance, and the Air Force asserts that because the

protest is untimely and Eklund, as the third low offeror, is not an interested party, Eklund's protest would not have been successful absent the Air Force's corrective action, and the protester thus is not entitled to reimbursement of its proposal preparation and protest costs. We disagree.

Under our Bid Protest Regulations, where a protest initially is filed with the contracting agency, a subsequent protest to our Office must be filed within 10 working days after the protester learns of adverse action at the agency level. 4 C.F.R. § 21.2(a)(3) (1989). We have held that oral notification of the contracting agency's denial of the protest starts the 10-day period running, and that a protester may not delay filing its protest with our Office until it receives written notice of the agency action. Universal Fuel, Inc., B-231870, Oct. 4, 1988, 88-2 CPD ¶ 318.

According to the Air Force, since Eklund received notice of the denial of its agency-level protest during the October 20 telephone conversation, as discussed above, its failure to file a protest with our Office until December 11, more than 10 working days later, renders it untimely. In the alternative, the agency argues that even if the firm did not become aware of the adverse agency action until it received written notice, it is "highly unlikely" that 11 days (November 17 to November 28) were necessary for the Postal Service to deliver the written notice; the Air Force argues that we instead should assume that the notice was received within 1 week of mailing, in accord with Technology for Advancement, Inc., B-231058, May 12, 1988, 88-1 CPD ¶ 452. Based on this calculation, the protest would be untimely even if based on receipt of written notice.

We find the protest was timely. The agency's account of the facts notwithstanding, the evidence is at best inconclusive as to the content of the telephone conversation of October 20. The protester asserts that it was not advised of the denial of its protest; that while the contracting officer advised it was her impression the protest would be denied, the evaluation was still ongoing. Eklund also asserts that the fact that the conversation was 90 minutes long and that the contracting officer permitted Eklund considerable time to explain its position tends to support its conclusion that no decision had been made on the protest at that time. The agency has not submitted any contemporaneous documentation to support its assertion that it notified Eklund that its protest was denied during this conversation. We agree that the points noted by Eklund concerning the nature of the conversation, as well as the fact that the denial letter was dated November 17, almost

1 month later, supports Eklund's position that it was not advised of the denial of its protest and, indeed, that a decision had not even been reached at that time. Because there remains a dispute between the agency and protester on this point, we are unable to rule conclusively as to timeliness. However, it is well-established that we will resolve doubt as to when the protester became aware of its basis for protest, the situation here, in favor of the protester for purposes of determining timeliness. See Apex Micrographics, Inc., B-235811, Aug. 31, 1989, 89-2 CPD ¶ 205. The protest therefore is not untimely based on the October 20 telephone conversation.

As there is no clear evidence of earlier notice, we can only conclude that Eklund learned of its protest basis upon receipt of the November 17 written notice. In this regard, the case cited by the Air Force as creating a presumption of receipt within 7 days is relevant only to those situations in which there is no evidence to the contrary that the notice was received later than 1 week from the time of mailing. See Technology for Advancement Inc., B-231058, supra. Here, the protester claims it did not receive the written notice until November 28, and has submitted a copy of the notice that is date-stamped November 28. At the same time, the agency has not submitted a return receipt or other documentary evidence indicating delivery any time prior to that date. Consequently, there is no basis for assuming receipt of the November 17 letter prior to November 28. As Eklund then filed its protest on December 11, fewer than 10 working days after November 28, its protest was timely.

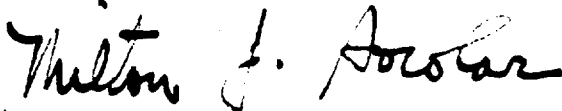
The Air Force argues that Eklund is not an interested party, 4 C.F.R. § 21.0(a), because, even if its protest of the award to Inframetrics were sustained, it is not next in line for award; since Eklund's price is only third low and the solicitation provided that award would be made to the lowest priced technically acceptable offeror, the agency contends that the intermediate offeror, UTI, and not the protester, is next in line for award. Thus, according to the agency, Eklund has no direct economic interest in the matter.

We disagree. Eklund's protest raised the question of whether the agency improperly waived specifications in a brand name or equal procurement without notifying Eklund and giving the firm an opportunity to offer on the allegedly relaxed requirements at a revised price. The appropriate relief for such an impropriety could have been a recommendation that the protester and any other offerors be given an opportunity to compete on the revised specifications. In these circumstances, we consider Eklund to have a sufficient

economic interest in the outcome to be deemed an interested party, notwithstanding the fact that the firm was only third low in price and the second low offer was found acceptable. See Tri Tool Inc., B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310.

While we therefore sustain the protest, since the contract already has been performed, recompetition no longer is available as a remedy. By separate letter of today, however, we are advising the Secretary of the Air Force that we find Eklund entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees, as well as its proposal preparation costs. 4 C.F.R. § 21.6(d); Rotair Indus., Inc., B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636. Eklund should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

A handwritten signature in cursive script, reading "Milton J. Aroskar".

Acting Comptroller General
of the United States